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AUTHOR Craig, Benjamin I.
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ABSTRACT

This report, written by the defense counsel for the Denver Board of Education, analyzes the events prior to and the chronological details of a law suit, filed in June 1969 against the Denver School District, alleging racial segregation. Events between 1956 and 1962 that led to the litigation are recounted: school board action in regard to boundary changes, formation of a citizens committee to fight boundary changes, new schools built, and the 1962 special study committee report. The city is described geographically and demographically, and the history of school board decisions on school integration is provided. At the time of this report, the suit was still in the appeal process. (MLF)

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THE ANATOMY OF A BUSING CASE *

Our topic today is "The Anatomy of a Busing Case", and I have in mind a specific case. The Denver newspapers called it the biggest story of the year 1969. Keyes, et al. v. School District No. 1, et al., was a class action against the Denver School District, its Board of Education, and its Superintendent, alleging racial segregation in the Denver Public Schools.

I. Definition of Busing

Before we discuss the case, it might be well if we defined the term "busing". Busing, to say the least, is controversial. It is so controversial that we can't even agree on its spelling. Some people use one "s" and some use two. Webster accepts both. I prefer one in order to distinguish it from the German word "buss", meaning kiss.

In any event, it is a poor gerund, meaning to transport by omnibus. Specifically, it is used in modern parlance to mean transportation of children to and from school by bus. In rural areas where long distances are involved, it is a well accepted and often demanded practice.

Some states have laws requiring school districts

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to furnish transportation for children living fixed distances from school. Other states leave the matter to the discretion of the local school district. This kind of transportation is not generally thought of as busing.

Since the school segregation cases, beginning with Brown v. Board of Education of Topeka, the term has taken on a different meaning. It connotes an element of compulsion - the forcing of one to do something against his will, as in compulsory busing, or, worse yet, compulsory cross-busing.

Generally, wherever a court finds that a school district is segregating pupils according to race in violation of the Constitution, it orders the situation to be remedied by desegregation. This usually involves some plan prepared by the school district, and approved by the court. These plans often include transfer plans, redrawing school attendance boundaries, creation of satellite zoning, pairing of schools, and other devices. The busing comes in as a result of underlying state law or local school policy as the only practical means of getting children from their residences to their schools of assignment where great distances are involved.

When school districts offer voluntary transfers and provide free transportation for those who elect to transfer, this is not generally regarded as busing, even when the purpose is to integrate schools. This is because of the

absence of the element of compulsion.

In recent arguments before the Supreme Court in the Charlotte-Mecklenburg cases, Mr. Justice Black posed an interesting question: Would the Constitution be violated if the state of North Carolina simply discontinued the practice of providing free transportation for any of its school children? I'm not sure the Court will answer that one, but I hope it does give us some answers to other important questions before it.

II. Setting

Before I get into the lawsuit proper, I should give you a bit of a setting.

Denver, like many cities across the country, has experienced rapid growth both during and since World War II. In 1940, its population was 322,000. By 1960, it had reached 494,000, and the 1970 census reported that the City and County of Denver proper had a population of approximately 525,000, and the entire metropolitan area has a population of approximately 1.2 million.

Politically, Denver was organized as a city and county by constitutional amendment in 1902. That amendment also provided that the city and county would always be served by one school district with boundaries co-terminous with the city and county.

Geographically, Denver is roughly square, approximately

11 miles north and south and 9 1/2 miles east and west, or approximately 100 square miles. The South Platte River flows from the south to the north through the city a short distance west of the city center. Denver's growth has been to the east and southeast over the past 25 years, much of it by territorial annexation of undeveloped land and subsequent development, primarily for residential uses, neighborhood businesses, and shopping centers. Annexations, all of them since World War II, have totaled approximately 62 square miles.

Demographically, the city is most densely populated near its center and north and west of its center. Negroes were concentrated in a rather small area immediately north of the center of the city in the 1940's. Spanish Americans or Hispanos were concentrated further to the north and to the west of the city center.

These are also the areas of the lowest family income, according to 1960 census figures. After World War II, the Negro population started to expand and migrate directly to the east. It reached Colorado Boulevard, about half-way to the city limits, in the late 1950's, and then moved on eastward through middle and upper middle class residential areas to the city limits during the 1960's.

During this time, the Negro population grew in percentage from 2.4% in 1940 to 6.1% in 1960. The percentage of Negro

school enrollment increased more rapidly because of larger families of school age children.

As I mentioned, the school district was created in 1902 along with the city and county, and its boundaries were co-terminous with those of the city and county. It is governed by a seven member Board of Education who are elected at large for staggered six year terms. The Board has always maintained a neighborhood school policy, that is, a policy of requiring all children living within the defined attendance areas of a school to attend that school. It has never assigned children to schools based on their race. There is no state law requiring the transportation of children to school, but the Board has a policy of providing transportation for elementary children living more than 1-1/2 miles from school and junior high children living more than 2 miles from school. About 10,000 children are transported under this policy. No transportation is provided for senior high students.

Because of the growth of the city population, the school enrollment doubled from 43,960 in 1946, to 86,951 in 1959. Then it went on up at a more gradual rate to 96,260 in 1965 and has leveled off since then at 96,634 in 1970. During this time, the District spent over $100 million for school buildings, and now operates 117 schools - 92 elementary, 16 junior high, and 9 senior high schools.

The estimated ethnic distribution of elementary school children in Denver in 1962 was: Anglo - 72.4%, Negro - 10.3%, and Hispano - 16.3%. In October, 1970, the distribution was: Anglo - 58.8%, Negro - 15.5%, and Hispano - 24.0%.

The District Judge who heard our case never quite got over the fact that all whites were called "anglo" by the plaintiffs. On the last day of the trial, he remarked to a witness:

> "You know, of course, that they put the Irish in the same category as the Anglos; an astonishing conclusion. They have never before in history been called Anglos, prior to this trial."

Whites of other national origins might have been equally astonished to learn that they were called Anglos by the plaintiffs.

III. Events Leading up to the Lawsuit

Events leading up to the lawsuit in June of 1969, are important to an understanding of the facts of the case and comprised most of the evidence in the case.

Of course, the leading school segregation case of Brown v. Board of Education of Topeka, handed down by the Supreme Court of the United States in 1954, aroused interest in Denver, but not too many people thought it had any application since Denver has never maintained a dual school system.

Then, in 1956, a citizens committee was formed to fight proposed boundary changes for Manual High School and Cole Junior High School, both newer schools in the north central part of the city near heavily Negro residential neighborhoods. Old Manual High School had been replaced by a new building on the same site in 1953, was operating under capacity when it opened, and the Board adopted new boundaries in 1956 to better utilize the capacity of Manual and relieve overcrowding at nearby East High School. At that time, Manual had a Negro enrollment of approximately 42%, and East High had a Negro enrollment of approximately 2%.

The boundary change was made by the Board of Education in June of 1956, and the citizens committee threatened to bring an action in July, alleging that the boundaries had been "gerrymandered" and reflected a design by the Board to keep Negroes out of East High School and two Junior High Schools.

By 1958, the eastward Negro migration was nearing Colorado Boulevard, a north-south arterial street and state highway about midway between the city center and its eastern boundaries. Larger families of school age children concentrated in this area were causing over-crowding in the elementary schools west of Colorado Boulevard, and it was necessary to transport some children by school bus to Park

Hill Elementary School east of Colorado Boulevard. Many of these children were Negro, and Park Hill, at that time, was almost totally white except for the transported children. Since the school administration did not permit racial identification of school children on school records fearing that this could be considered a racial classification prohibited by the Colorado Constitution, it was never established how many of the transported children were Negro.

To alleviate overcrowding of elementary schools, the Board authorized construction of a new elementary school on the south end of a large site acquired by the Board in 1948 for a junior high school and an elementary school. The new school, Barrett Elementary School, opened in 1960. The racial composition of the school was never established because of the lack of records, but it was conceded that its pupil membership was predominantly Negro. The eastern boundary line of the new school's attendance area was set on the west edge of Colorado Boulevard so that children would not have to cross a six-lane highway. At the time Barrett opened, other schools east of Colorado Boulevard had significant numbers of Negro children, although the exact numbers and percentages are not known.

Some Negro leaders objected to the location of Barrett School and suggested, as alternatives, additions

to existing elementary schools west of Colorado Boulevard to alleviate crowding in those schools.

By 1962, two years after Barrett opened, the Negro migration had caused overcrowding in the junior high schools, and the Superintendent of Schools proposed to the Board of Education that it implement its tentative plans to construct a new junior high school on the north end of the large site at approximately 32nd Avenue and Colorado Boulevard. The south end of that site was then occupied by Barrett Elementary School, which, at that time, was 79.2% Negro.

In May, 1962, the schools started to keep records of Negro, Hispano, Oriental and other students, based upon a count made in the classrooms by the school principal or a person appointed by him, during the fourth week of school. Individual pupils were not identified by race. All data showing the estimated racial and ethnic distribution of pupils used at the trial was compiled each year in this manner, and the method is still in use.

The proposal for the new junior high school was made after the case of Taylor v. Board of Education of New Rochelle, 294 F.2d 36, had been decided by the Second Circuit in 1961. Very briefly, that case held that the Fourteenth Amendment was violated when a school district deliberately gerrymandered attendance boundaries of schools on the basis

of the race of the residents, with the purpose and effect of producing a substantially segregated school.

The proposal met with immediate opposition by a number of organized groups who feared that the new junior high school would open with a high percentage of Negro students. The groups had different axes to grind, and one of them was a group of white residents of the area who feared that the new school would cause an exodus of the white families from the area. Other groups suggested legal action, and yet others asked the Board to appoint a special committee with citizen representation to look into the situation and make a report to the Board.

In June of 1962, the Board deferred action on the proposal and created a Special Study Committee on Equality of Educational Opportunity in the Denver Public Schools with a charge to study and report the present status of equality of educational opportunity in the schools in the specific areas of curriculum, instruction and guidance, pupils and personnel, buildings, equipment, libraries and supplies, administration and organization and school-community relations. The study was to give special attention to racial and ethnic factors.

The committee was composed of a chairman and vice-chairman, three residents of each of eight high school areas, six Denver Public Schools staff members, and, as ex-officio

members without vote, the School Board members, the Superintendent and the Deputy Superintendent.

The committee made an exhaustive study and gathered together in its report much data not previously compiled by the District. Generally, the committee found that the School District was doing a good job of educating the children of Denver, that its facilities were equal, that residential de facto segregation existed in Denver but that the school system had not created this situation, and that transportation of pupils for the purpose of integrating school populations was regarded as impractical, although both the schools and the community had a responsibility to eliminate the effects of de facto segregation.

The committee made many specific recommendations for improvement of the school system, and most all were accepted and implemented by the Board. They included a written pupil transfer policy; a limited open enrollment policy; the creation of a department of school-community relations; policies on establishing school attendance area boundaries which would take into account racial factors as well as geographical factors in order to obtain, to the extent possible, a heterogeneous community; elimination of optional attendance areas; human relations training for principals; assignment of teachers and administrators without regard to race; team teaching and teacher aides; remedial

reading and other programs.

During the course of the deliberations of the Special Study Committee, we were called upon by the Superintendent to provide him with a memorandum of the then current state of the law for his use and for the use of the committee. That memorandum and its supplements considered the cases and the duty of the School Board when the report and recommendations of the study committee were presented showing racial and ethnic data not previously known to the Board. Our conclusion was that the Board could no longer be "color blind" once such information became available to it, and whenever a decision was to be made and all other factors were equal, it should choose the alternative which would tend to alleviate the de facto segregation in the schools rather than make it worse, because to choose the alternative, which would make de facto segregation worse, could be considered as evidence of intent to segregate de jure. We also concluded that the Board had no constitutional duty to change a de facto situation which it did not create.

In 1965, the chairman of the Special Study Committee and one member of that committee, a Negro housewife, were elected to the Board of Education for six year terms.

Before the study committee was appointed, the Superintendent made some minor boundary changes in some

of the northeast Denver elementary schools in order to alleviate overcrowding. Later, in 1964, more minor boundary changes were made in the elementary schools in northeast Denver, and some major boundary changes were made in the junior high schools of the area to accommodate growing numbers of junior high students in northeast Denver. These changes resulted in a good deal of integration in the junior high schools. For instance, a portion of the area west of Colorado Boulevard and north of City Park was detached from predominantly Negro Cole Junior High School and assigned to predominantly white Gove Junior High School.

In 1966, the Board of Education, in response to claims that the major civil rights organizations were not represented on the Special Study Committee, and the need for advice on other matters such as the location and financing of new school buildings, created an advisory council. The Council was badly split on philosophical grounds, and because of this it was not very productive. The split caused a minority report to be filed. The majority did recommend a school capacity study, a cultural arts program, a superior schools program for two junior high schools, and educational centers. The chairman of the advisory council and the author of the minority report were elected to the Board of Education in 1967.

In May of 1968, after hearing many citizens, pro and con, the Board of Education adopted Resolution 1490 by a 5 to 2 vote. The two dissenters were the members of the Advisory Council who were elected in 1967. Resolution 1490 is better known as the Noel Resolution, named for its author, Mrs. Rachel Noel, the only Negro member of the Board. It provides in part:

> "Therefore, in order to implement Policy 5100, the Board of Education hereby directs the Superintendent to submit to the Board of Education as soon as possible, but no later than September 30, 1968, a comprehensive plan for the integration of the Denver Public Schools. Such plan then to be considered by the Board, the Staff and the community and, with such refinements as may be required, shall be considered for adoption no later than December 31, 1968."

The policy referred to, No. 5100, had been adopted in 1964 in response to the first study committee recommendations, and provided in part:

> "The continuation of neighborhood schools has resulted in the concentration of some minority racial and ethnic groups in some schools. Reduction of such concentration and the establishment of more heterogeneous or diverse groups in schools is desirable to achieve equality of educational opportunity. This does not mean the abandonment of the neighborhood school principle, but rather the incorporation of changes or adaptations which result in a more diverse or heterogeneous racial and ethnic school population, both for pupils and for school employees."

The Superintendent engaged educational consultants who were of some help, but the bulk of the 120

page plan, entitled "Planning Quality Education," was developed by two members of his staff with his guidance.

The plan called for a number of measures to bring about contact and understanding between pupils of diverse racial, ethnic and socio-economic backgrounds, but the principal vehicle was the model-school complex, chiefly a different means of administering to local schools. It linked several schools together with a common administration and a sharing of facilities. Thus, the 92 elementary schools would be organized into 12 elementary school complexes. This would achieve some degree of racial and ethnic integration within the complex.

The plan also provided for voluntary open enrollment with transportation provided for transferring students, provided that there was space available in the receiving school and that the transfer improved integration.

Phase I of implementation of the plan required immediate implementation of the voluntary open enrollment plan, transportation for special programs such as the cultural arts center, changing subdistrict boundaries to reduce racial concentrations and assist in neighborhood stabilization, innovative compensatory educational programs, and new teaching methods.

The Board of Education received the report without

approving it in October, 1968. It adopted the Voluntary Open Enrollment Plan in November to go into operation at the second semester in January of 1969. It then turned its attention to changing boundaries of schools in northeast Denver in an attempt to balance and stabilize the racial and ethnic composition of student populations.

Smiley Junior High School was then 71.6% Negro, overcrowded, and there was concern about fights and other disruptions in the school. East High School was then 39.6% Negro and changing rapidly. Barrett Elementary School, as well as several other elementary schools in the Smiley sub-district, were predominantly Negro.

The Superintendent's staff, at the direction of the Board, prepared plans to stabilize these schools, which involved detaching predominantly Negro school attendance areas and assigning them to other predominantly white schools in the south-central and southeast part of the city, and re-routing a number of elementary and junior high pupils from Lowry Air Force base who were already being transported, to the predominantly Negro schools. This system of satellite zoning, coupled with the District's policy of transporting children living beyond 1-1/2 miles from their assigned elementary school and 2 miles from their assigned junior high school, would have resulted in additional transportation of some three thousand pupils.

Three resolutions, later numbered 1520, 1524, and

1531, were prepared to implement these plans. There followed, in early 1969, a number of heated public hearings on the proposed boundary changes. They were televised and the entire community was informed and aroused. The terms of two of the five Board members who had voted for the Noel Resolution were to expire in May, and the five member majority pushed very hard for action. The last of the three resolutions was passed in April of 1969, and all were to take effect in September of 1969.

Both of the incumbent members ran for re-election in May, one as an independent. The other, teamed with another candidate, were known as pro-busing candidates. Two others ran as a team and were known as anti-busing candidates. The anti-busing candidates won handily on a city-wide basis.

The Board majority was thus changed. At a meeting on June 6, 1969, the new majority rescinded the three resolutions by a vote of 4 to 3. The majority then passed a new resolution numbered 1533, which contained all the provisions of the three rescinded resolutions, including implementation of two of the proposed elementary school complexes, transporting Negro pupils out of northeast Denver schools to relieve overcrowding, and a beefed up voluntary open enrollment plan, but it did not contain the boundary changes. The Board left Policy 5100, the Noel Resolution, and the Superintendent's plan intact, but placed emphasis

on voluntary transfers to improve integration.

We had been expecting some kind of legal action since the early 1960's because of the various threats by groups on both sides of the issue of school integration. As a result of the 1964 boundary changes, one white parent brought suit in state court alleging that the Board members and the Superintendent had violated their oaths of office as well as the Colorado Constitution by considering race in changing the boundaries. The complaint was dismissed at the motion stage on technical grounds, and the case was dropped.

During the time of the hearings on the three resolutions, there were rumblings of a legal action to enjoin implementation of the resolutions on the grounds that they discriminated against white children because of their race. At the same time, word reached us that a committee of some thirty Denver lawyers were working and would commence a legal action if the resolutions were not passed. Although they must have anticipated it, they apparently were surprised by the action of the new Board in rescinding the resolutions. They did not react quickly enough to attempt to enjoin the rescission before it took place, but they did adapt their action to this changed circumstance.

Some might think that our legal position would be inconsistent in the face of such an abrupt change in

the policy of the Board, but we had no trouble with that. Our position was, and is, that the Board had the power and discretion to change school zoning in the interest of improving education, and that the wisdom of its educational policy was not subject to review by the courts so long as it did not infringe on the Constitutional rights of the persons that it affected and, absent such a finding, no court had jurisdiction to interfere in the local government of the school district to the extent of second-guessing the Board on matters of educational policy.

I was pleased to learn that the Solicitor General of the United States agrees with this position. In the recent arguments in the Charlotte-Mecklenburg cases, he responded to Mr. Justice White's question as follows:

> MR. JUSTICE WHITE: "What of a system where there was no dual system in the past or government action? Is it true that the school board, to achieve certain goals, could redraw lines of attendance even if the lines take race into consideration?"
>
> THE SOLICITOR GENERAL: "Yes it could. But absent past discrimination the Constitution does not require it."

Since my senior partner had been the attorney for the School District since 1932, and had been privy to almost every informal conference of the Board, and had discussed boundary changes, building locations and school assignment policies with the Superintendents and staff, we knew that

There was never any intentional discrimination on the basis of race. Since the early 1960's, I had been privy to many of these decisions myself. One thing did worry me, and I expressed it to the Superintendent and his two staff members. That was a "ratchet" effect of any decision by the Board which would tend to reduce de facto segregation. In other words, I was concerned that any reversal of such action would, in itself, be circumstantial evidence of an intent to discriminate. I feared that the old Board was pushing change so far that it could not later be undone, and I believe that at least one of its majority members was operating on this premise. The one factor here that could take the situation out of the irreversible ratchet effect was the fact that the resolutions were rescinded shortly after they were passed, very little planning had been done, and it was still three months before they were to become operative in the schools.

IV. The Lawsuit

On June 19, ten days after the recission action, a complaint was filed in United States District Court in behalf of eight parents and their minor school children, who alleged that they represented all school children attending segregated or substantially segregated schools. Five of the plaintiffs were Negro, one Hispano and the other two were denominated "Anglo".

The complaint contained two causes of action, the first contained six counts and the second contained four counts. The first cause of action dealt with what we will call "resolution schools" - those in northeast Denver affected by the three resolutions. The prayer was for reinstatement and enforcement of the resolutions by injunction. The second cause of action alleged de jure segregation of the predominantly minority schools in the central area of Denver, and prayed for an order to desegregate them.

The complaint was accompanied by a motion for temporary restraining order to prevent cancellation of a purchase order for twenty-seven new school buses and destruction of documents and class programs then in existence and designed to implement the three resolutions in September. There was also a motion for a preliminary injunction.

Two Denver lawyers signed the complaint, three other lawyers from the NAACP in New York were listed as attorneys for the plaintiffs, and nine other Denver lawyers were listed as "of counsel".

We were short-handed in our office because our senior partner was on extended sick leave, and the next senior man was out of the city. We immediately attempted to retain trial counsel to help us with the hearing on motion for preliminary injunction, but none was available.

We spent several days preparing for a hearing on

the temporary restraining order, but that hearing was not held. The plaintiffs then took the deposition of the Superintendent, which lasted two days. Then there were motions for production of documents and to inspect the voluminous files of the School District, which were tremendously time consuming. On the Saturday before the hearing was to begin, on Wednesday, July 16, we were served with 75 prepared exhibits and a list of 16 witnesses. At 9:00 the night before the hearing commenced, we were served with another 45 prepared exhibits and a supplemental list of three more witnesses. On the morning of the hearing, we were served with the answers of the three minority members of the Board of Education, who appeared in their individual capacities pro se, and confessed judgment.

The exhibits included the three resolutions, the reports of the study committies, the Superintendent's plan and other voluminous documents from the files of the School District, plus a large number of maps and overlays, statistical charts and diagrams, all prepared by a statistician from the University of Denver and a medical doctor who had a personal interest in the case. They obviously had been preparing for months.

The plaintiffs limited the scope of the hearing to two counts of their first cause of action, that is, the cause of action relating to the resolution schools.

Their first theory, based on Brown v. Board of Education, was that since 1960, the defendants had intentionally segregated the plaintiffs on the basis of their race. The second theory was that while the defendants had no duty to integrate, they had a duty to refrain from taking action which would intensify segregation, regardless of motive or intent. The first theory was directed to the location of Barrett School and the minor boundary changes in northeast Denver elementary schools in 1962 and 1964. The second theory was pointed to the rescission of the three integrative resolutions. This was the "ratchet" that we feared, although it was never presented or argued as such, and throughout the hearing the facts were blurred to give the impression that the resolutions had actually gone into effect. Statistical charts and tables showed racial percentages in the schools as if the resolutions had been implemented and the effect of the rescission was to resegregate the children by placing them back in their former schools. This was simply not the fact. The resolutions had been rescinded three months before any children were to have changed schools.

Part of the evidence consisted of testimony of one of the Board members defeated in the May election, and two of the Board members who confessed judgment. They testified that the Board had intended the resolutions as an attempt to stabilize the racial composition of the schools

and maintain a racial balance in the schools of the area which more nearly approximated city-wide averages. Much of the statistical data presented was an attempt to show variance from city-wide averages, or, in other words, racial imbalance. An exhibit prepared by the statistician purported to show a segregation index. On this index, perfect racial balance was the optimum and deviations from that optimum were shown on the graph. Thus, a 100% white school would show up on the index as a segregated school. Other exhibits were interpolations of census data designed to establish the racial composition of schools where such information was unavailable from school sources.

The hearing went on for five days and 757 pages of transcript. The background of the construction of Barrett School, the minor boundary changes in northeast Denver, the use of mobile classroom units in those schools as a temporary means of accommodating the growing numbers of pupils, and assignment policies of teachers were all thoroughly discussed by witnesses for both sides. Dr. Dan Dodson, a professor of education from N.Y.U., who had prepared the Dodson report which became a factor in the New Rochelle case was called as an expert witness. A significant thing about his testimony was the distinction between integration and desegregation. He defined integration as psychological acceptance of people so that race and creed or such things don't make any difference. He defined desegregation as the

forced mile required by the law.

The plaintiffs argued that their evidence proved an intent to segregate because of the absence of any attempt to justify the construction of Barrett School and the elementary school boundary changes on educational grounds, and further, that the rescission of the resolutions was unconstitutional because they were a gerrymander - the ultimate gerrymander - in effect re-drawing the boundaries as they had existed prior to the passage of the resolutions.

We argued that the Board had pursued a color-blind policy of school zoning until the report of the Special Study Committee was received in 1964, and that it made these decisions based on racially neutral factors such as geography and numbers of pupils. In fact, the Board had no racial data available to it at the time the decisions were made. As to the rescissions, we argued that there was no irreparable harm sufficient to support an injunction, in fact, no harm at all, since the resolutions had never been placed into effect. Indeed, the replacement plan, Resolution 1533, had a beneficial effect when compared to what was available the previous fall, because it offered the voluntary open enrollment plan with transportation provided. We argued that the office of a preliminary injunction was to preserve the status quo, and that the plaintiffs were asking for a mandatory injunction to reinstate the

resolutions, the ultimate relief sought in their complaint. Further, since their theory was that a board had a duty to prevent de facto segregation and this was admittedly a novel theory, they had shown no probablilty of success on the merits, because, having relied on a novel theory, there was no law to support them.

The judge perked up his ears at our suggestion that the plaintiffs wanted a mandatory injunction. I had the feeling throughout the hearing that we were not getting through to him, yet I really couldn't bring myself to believe that their evidence really proved anything which could rise to the level of a violation of the Fourteenth Amendment. He actively participates in his trials, and he was most active in this one, but even when some of his remarks and questions indicated that he was leaning toward the plaintiffs, I really didn't believe that they had a case, even giving them the benefit of every bit of controverted evidence. Then at the end of my argument, I began to have some hope that he would deny the preliminary injunction and we would get the time that I knew we needed to put on an affirmative case that would put the facts in the proper perspective, and the time we needed to prepare more lucid briefs on the law.

He then asked the plaintiffs' counsel:

"Then what you want is really a mandatory injunction

requiring them to carry out 1520, 1524, and 1531?

MR. GREINER: "I believe that is correct, Your Honor."

THE COURT: "I haven't got the power to do that."

MR. GREINER: "Oh, sure, you do."

THE COURT: "No, I don't. . ."

THE COURT: "The only thing I can say to you, Mr. Greiner, is that if what you request is granted, the law suit is all over. No point in having a hearing next fall or any other time. You will have prevailed, and there is nothing else to try because I will have found all the disputed facts and all the disputed law in your favor. That's what you want, I am sure."

Well, he took the case under advisement, and I am sure that he didn't sleep much that night.

The next morning, the news had banner headlines to the effect that Judge states he has no power to grant mandatory injunction. Our hopes were short-lived. The Judge called us in that day, July 23rd, and announced his ruling from the bench. He had, indeed, resolved all disputed facts and law in favor of the plaintiffs and had granted the mandatory injunction. I asked for a stay and was granted ten days.

From there, we were off to the races. The Court filed his written opinion on August 1, (303 F. Supp. 279). We filed our notice of appeal and filed our motion for stay pending appeal in the Tenth Circuit Court of Appeals. It

was set for argument on August 5, and the Court required simultaneous briefs. The motion for stay was argued the morning of August 5. After noon, the Court of Appeals called and wanted to hear more argument on the effect of Section 407(a) of the 1964 Civil Rights Act. The Court had correctly interpreted the three resolutions as racial balancing measures by the School Board and questioned the enforcement of them by the District Court. Finding that the District Court had not considered the Act, the Court of Appeals, in an order issued that day, remanded the case for consideration of the effect of the Act.

The next day, we were back in the District Court arguing Section 407(a). Briefs were filed, and the District Court issued its supplemental findings and opinion on August 14, (303 F.Supp. 289), holding Section 407(a) inapplicable because it had found de jure segregation, but it did eliminate the senior high schools from the operation of the injunction since East High could not have been segregated because it had less than 50% Negro students.

After another all-night session and another brief, we again argued in the Court of Appeals on August 22.

At 5:00 P.M. on Wednesday, August 27, the week before school opened, the Court of Appeals released its opinion granting our stay. At 8:00 P.M. the same evening, we were served with a motion in the Supreme Court of the United States to vacate the stay and reinstate the preliminary injunction.

It was addressed to the Honorable Byron R. White, Circuit Justice for the Tenth Circuit. We had expected this to happen, and I had talked with the Deputy Clerk earlier that day. He advised that if we wanted to oppose such a motion, we must have a written response filed by 2:00 P.M. the next day in Washington, and that it had to be hand carried.

After another all night session, we were on a plane at 6:00 the next morning and preparing oral argument. We filed our written response by 2:00 P.M. The case was assigned to Justice Brennen because Justice White was in Colorado on vacation. We were told that we would be called if the Justice wanted to hear oral argument. At 4:00 P.M., the Clerk called to say that Justice Brennen did not want to hear oral argument and that he was writing something which would be announced at 10:00 the next morning, Friday, August 29. I knew then that he would grant the motion because the Supreme Court Rules provide that a denial is accomplished by simple endorsement on the motion and it may then be presented to another Justice. At 10:00 the next morning, we were handed copies of a three page, printed opinion, granting the motion and reinstating the judgment. This opinion is reported at 24 L.Ed.2d 37. That same evening, we were on a plane headed back to Denver.

We arrived at about 8:30 P.M., went to the office where four of our men were working on a new motion asking the Court of Appeals to amend its order of August 27, by

correcting the deficiency noted by Justice Brennen, namely that the Court of Appeals had not specifically found that the District Court had abused its discretion. The motion was filed, but time had run out. School started the next Tuesday, and the resolutions were made operative as to the elementary and junior high schools affected. Nevertheless, the motion was briefed and argued, and the Court of Appeals filed its opinion on September 15th. It was rather strongly worded - "The record before us at the time of our order showed that Colorado has not, and never has had, any state imposed school or residential segregation. No discrimination in school transfers was either shown or claimed. No gerrymandering was shown or claimed. The district court's findings of de jure segregation, or a dual system, were confined to a small number of schools and were based on the failure or refusal of the School Board to anticipate population migration and to adjust school attendance districts to alleviate the imbalance resulting from such population shifts" -- but the opinion concluded that the public interest would be best served by denying the motion in view of the change in the status quo and holding the appeal in abeyance until after a trial on the merits.

As a sidelight, two of the three judges on that panel have since retired, and the third is deceased. As another sidelight, the District Judge who tried our case

has been proposed to fill one of the vacancies on the Court of Appeals.

The rest of the year, the case went like this:

September 26: Secured services of well-known Denver trial attorney as special trial counsel.

October 6: Answer filed.

October 16: Plaintiffs' first motion for production of documents served. Calls for estimated 8,000,000 to 11,000,000 raw test scores of pupils among other items.

October 17: Received Plaintiffs' first set of interrogatories - 300 questions requiring 90,000 separate answers.

October 20: Motion to intervene, answer and cross claim of intervenors.

October 21: Trial of long hair case - same District Judge.

October 28: Plaintiffs' second motion for production of documents.

October 29: Plaintiffs' second set of Interrogatories.

November 13: Pretrial set November 25, trial set for January 5, 1970.

November 14: Teachers' strike.

November 18: State court action for temporary restraining order against picketing.

November 25: Pretrial conference.

November 26: Strike settled.

December 8 - December 29: Preparation of exhibits and interview witnesses: Plaintiffs' exhibits total 344, Intervenors' 19, and Defendants' 99.

December 29: Hearing on objections to class action.

January 1, 1970: Special trial counsel dies of coronary.

January 6: Secured services of a well-known Denver trial attorney as new special trial counsel and obtained a continuance of the trial to February 2.

February 2: Trial on merits - the Court ruled that no evidence introduced at preliminary hearing need be presented again at trial.

February 5: Denver Public Schools school bus parking lot hit by bombs; 23 school buses and 3 trucks destroyed; 21 school buses and six trucks damaged.

The trial proper lasted fourteen days, and produced some 2,250 pages of transcript. The plaintiffs' case was focused on their second cause of action relating to the schools in the central area of Denver which do contain high percentages of minorities. Under their first theory, they concentrated on alleged gerrymandering of boundary lines and location of new buildings in an attempt to show the same kind of de jure segregation as they had done so successfully at the preliminary hearing.

Their second theory was that the concentrations of minorities in the schools of the area produced unequal

academic achievement, and even if the school district was not responsible for the concentrations, it was, on pure equal protection grounds, obligated to correct the unequal educational output by changing the peer group if necessary just as in the pre-Brown cases following Plessy v. Ferguson, boards of education were required to provide equal facilities.

Our case was rebuttal of alleged gerrymandering in the core city schools, and directed to rebutting the findings of the Court at the preliminary hearing with reference to Barrett School and the elementary school boundary changes in Northeast Denver. There was direct testimony of the Superintendent, Principals and Board members, that there was no intent to discriminate and decisions were made objectively on the basis of accommodating numbers and in the best interests of all children.

The case was thoroughly briefed and argued, and a written opinion was handed down on March 21, 1970, and is reported at 313 F. Supp. 61. The prediction made by the Court at the close of the preliminary hearing held true. He reaffirmed all of his findings from the preliminary hearing, and added in East High School and Cole Junior High School to fully effect the prior resolutions. In so doing, he relied heavily on the California proposition 14 case of Reitman v. Mulkey, 387 U.S. 369, decided in 1967, and analogized the passage of the Constitutional amendment, proposition

14, which effectively repealed a California fair housing law to the recission of the three Board resolutions. We don't think the analogy is apt.

As to the second cause of action, the Court rejected the claim that the core city schools were de jure segregated, and found them to be de facto segregated. He found a lack of causation linking the alleged discriminatory acts to the end result. We might add here that he could have reached the same result as to the northeast Denver schools, had he applied the same reasoning.

The Court also rejected the contention that the neighborhood school policy was unconstitutional because it produced segregation in fact, citing decisions of the Tenth Circuit Court of Appeals.

The Court then turned to plaintiffs' equal protection theory and bought it, lock, stock, and barrel. He found a correlation between low achieving schools and race when the concentration of Negro or Hispano students reached 70-75%, but he refused to lump minorities together to get this result as the plaintiffs had urged. As a result, he found 14 elementary schools, two junior high schools, and one senior high school, which fit his criteria. The finding of unequal achievement and its correlation with racial isolation was the major factor. He stated that under the old Plessy rule, school boards were not required to abandon dual systems,

but were required to provide equal facilities, and today, school boards are not required to integrate de facto segregated schools, but are charged with the duty under the Fourteenth Amendment, of insuring an equal educational opportunity.

It strikes me that you do not measure "opportunity" by an output test such as the average achievement in a school. Opportunity does not mean guaranteed result. To me, it means equal input or even unequal input depending on the need. Individual achievement scores in the predominantly minority schools ranged as high as the 99th pencentile. This indicated to me that there were adequate inputs.

In any event, if this case goes down in history for anything, I'm quite certain that it will be for this equal protection innovation.

Having gotten that far, the Court was then concerned about the remedy, and we had a four day hearing and another 669 pages of transcript on remedies, commencing May 11, 1970. The Court heard the plaintiffs' experts, among them, Dr. James Coleman, author of the Coleman Report, and Dr. Neil Sullivan, the architect of the Berkeley, California integration plan. Our experts were the Superintendent, and the principals of predominantly minority Manual High School, Cole Junior High School and Bryant-Webster Elementary School.

Plaintiffs' plans were two computer programs -- one for pairing the 14 elementary schools with "anglo" schools.

That plan involved 31 schools and required the transportation of 11,109 students. The other plan was simply a numbers scramble to achieve a racial balance. It involved 29 schools and the cross-transportation of 8,380 students. Both of the plans meticulously balanced average achievement scores so that the product was racial balance and equal achievement. I couldn't help thinking that somehow the interest of the child got lost in the shuffle. The Constitution was satisfied by their mechanical arrangements, but the under-achiever didn't improve one bit. It reminded me of a quote from Mark Twain -- "there are three kinds of liars - plain liars, damned liars and statisticians."

During Dr. Coleman's testimony, the Court became disturbed about his thesis that the composition of the peer group had the greatest influence on the acedemic achievement of a child.

THE COURT: The thing that worries me about all this is that what you say is that the schools are not inferior as counsel proved at the trial, but that the students are inferior. They proved it overwhelmingly that the schools were inferior; their offerings were inferior. Now, in coming up with a new tack -- it's not the schools at all, it's the students and their economic and cultural deprivation that makes the educational experience one that is noncom-

petitive. It's dull; not exciting. I mean, I get that from what you're saying. Sort of a self-defeating proposition. They proved the constitution was violated and now they are unproving it.

THE WITNESS: I'm really trying to say the following that is, that first of all that, of the school resources which are provided by the school system, those which show more relation to a child's achievement are the characteristics of the teachers, in particular the verbal skills of the teachers. But that these are not as important for the achievement of the particular student in terms of our analysis as the social composition of the rest of the student body. Secondly, that with regard to compensatory programs, if one evaluates these programs simply in terms of the increase in performance that occurs as a consequence of them or that occurs for children who have participated in them, there is very little cause for optimism with regard to the overall effectiveness of these programs. But, of the things which the school board provides, the characteristics of teachers and in particular the verbal skills of teachers seem to be the most important characteristics.

THE COURT: We will take a short recess.

Dr. Sullivan testified that all his experience had been with voluntary integration plans and that it required at least two years to accomplish the planning and create an atmosphere of community acceptance.

The Defendants' proposed plan included a great number of innovative and beefed up compensatory education programs and a space guaranteed voluntary transfer plan for pupils in the 17 court designated schools.

The Court issued its Decision re Plan or Remedy on May 21, 1970, reported at 313 F. Supp. 90. In that opinion, he reviewed the evidence and observed that there were novel questions of law involved, one of which was whether compensatory education coupled with a voluntary transfer policy would satisfy the requirements of the constitution. He answered the question this way:

> "We have concluded after hearing the evidence that the only feasible and constitutionally acceptable program - the only program which furnishes anything approaching substantial equality - is a system of desegregation and integration which provides compensatory education in an integrated environment."

The Court then went on to direct the remedy which included the maintenance of a voluntary open enrollment plan as an interim measure, the desegregation of one-half of the 14 elementary schools by the fall of 1971 and the other half by the fall of 1972, and the compensatory education programs proposed by the Board. Special treatment was given to the junior and senior high schools.

With reference to the details of the plan, the opinion provided:

> "Because the plaintiffs and the School District have the expertise necessary for devising a system

> of school redistricting and transportation to achieve the result set forth above, we leave these details to them. But we stress that the details of the scheme must be carefully examined and checked, having in mind that the program is a human one. While the computers can be useful in such an effort, their results must be checked with care to prevent unnecessary burden to the persons involved. The final details will be subject to review by the Court. We have, of course, been reluctant to decree mandatory transportation, and it should be avoided to the extent possible."

We are now in that planning stage.

A final decree and judgment was entered on June 11, 1970, almost a year after the complaint was filed. Our Notice of Appeal was filed on June 16, 1970, and the Plaintiffs' Notice of Cross Appeal was filed on June 24, 1970. We again filed a motion for stay pending appeal, which was denied on July 28, 1970. The matter was accelerated, simultaneous briefs were filed on August 11, reply briefs were filed on August 17, and the matter was fully argued on August 18, 1970.

It was our general impression that the Court of Appeals intended to decide the case on the merits prior to the opening of school, but as yet, we have no decision. We suspect that the Supreme Court's action in setting the Charlotte-Macklenburg cases for argument on October 12, 1970, has caused the delay and we do not expect a decision from the Tenth Circuit Court of Appeals until after the decision of the Supreme Court in the Charlotte-Mecklenburg cases.

Shortly after our notice of appeal was filed, the plaintiffs filed a motion for leave to amend their complaint to add a claim for attorneys' fees. No action will be taken on that motion until the appeal process is completed.

V. Conclusion

If any observations are in order, all of us would probably agree that this whole process is a very poor way to go about making needed changes in our system of public education. In closing argument at the preliminary hearing, we quoted from the Second Circuit Opinion in Taylor v. Board of Education of New Rochelle:

> "Litigation is an unsatisfactory way to resolve issues such as have been presented here. It is costly, time consuming--causing further delays in the implementation of constitutional rights--and further inflames the emotions of the parties."

Admittedly, public school systems seem unable to provide stimulating and relevant programs for students. This is true regardless of the race or social class of the student, but the impact may be greater on the children from lower socio-economic classes where education is relied upon more heavily as the ladder of upward social mobility.

Reasons for this failure are not entirely clear, but it is clear that a new definition of the objectives of public education is needed. Identification of priorities

is needed and new approaches are needed. This is the duty of professional educators, not the courts, but if educators default, they are sure to be on the receiving end of more cases like this one. I believe that in our order of government, it is not the responsibilty of the courts to intervene, but history tells us that if one agency continues to default, some other agency will intervene.

While I disagree with the legal conclusions of the District Judge in our case, I can understand his sensitivity to the underlying problem. Our judges see the products of our imperfect educational systems before them almost every day - the social misfits and drop-outs who come before them accused of all kinds of anti-social behavior. Many of them cannot even express themselves. How can we expect them to compete in our dominant middle class society? They are not equipped. We have failed them, and in the process we have contributed to a good many of our current social problems. It is only natural that when the opportunity to do something about this underlying problem appears before them, judges feel compelled to do something, knowing that the solutions they suggest are not ideal, but hoping educators will take the ball from there.

Presented to the 16th Annual Meeting of the National Organization on Legal Problems of Education at New Orleans, November 19, 1970 by Benjamin L. Craig